Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise (sued as a firm)

HIGH COURT (TAWAU) — SUIT NO T48 OF 1985
RICHARD MALANJUM J
20 AUGUST 2002

Civil Procedure *— Affidavits — Affidavit in support of application — Non-compliance with O 32 r 13(2) of the Rules of the High Court 1980 — Rejection of affidavit purely on technical grounds — No prejudice shown — Whether there was error in rejecting affidavit — Rules of the High Court 1980 O 32 r 13(2)*

Civil Procedure *— Execution — Judgment — 14-year delay in executing judgment — Application for leave to execute disallowed — Delay caused by missing court docket and proposals by defendant to settle judgment debt — Whether there were good reasons given for the delay*

Limitation *— Execution of judgment — Limitation of 12 years — 14-year delay in executing judgment — Delay caused by missing court docket and proposals by defendant to settle judgment debt — Whether there were good reasons given for the delay — Whether plaintiff's application for leave to execute on the judgment should be allowed*

Words and Phrases *— 'Suit' — Meaning of — Sabah Limitation Ordinance s 2*

The plaintiff had obtained judgment in default against the defendant on 1 February 1985. On or around 10 July 1987, an application was made to execute that judgment against the partners of the defendant. The hearing was adjourned as the papers were not served. On 7 March 1988, an order to serve the papers by substituted service was granted. However, no date for the proper hearing of the application was given. It was then learnt that the court docket could not be traced. Several reminders were sent to the court for a hearing date but no response was given by the court. Then on 29 December 1993, the plaintiff's counsel was informed of the recovery of the missing docket and an advice was given that a fresh application should be made by the plaintiff. A second application was then filed in 1993 for leave to execute against the defendant as well as against the partners in the defendant. During the hearing on 15 April 1994, a proposal to settle the debt was made by one of the partners and the hearing was again adjourned to 28 October 1994 wherein the application was struck out with liberty to file afresh on the ground that the parties were in the process of negotiating a settlement. Nothing came about on the proposal to settle despite numerous negotiations. On 18 January 1999, the application for leave to execute was sent to the Tawau High Court Registry but it was returned to the plaintiff's counsel as unclaimed. On 27 December 1999, the same application was refiled and this was finally heard by the deputy registrar on 27 June 2000. The deputy registrar dismissed the plaintiff's application for leave to execute the judgment against the defendant and its partners. In rejecting the plaintiff's application, the deputy registrar ruled that

there were no good reasons given for the 14-year delay in executing the judgment and that mere negotiation was not a sufficient reason to grant leave. Another reason for the refusal was that in her view, the word 'suit' as defined in s 2 of the Sabah Limitation Ordinance ('the Ordinance') included execution proceedings. As such the deputy registrar ruled that the plaintiff's application was statute barred. At the hearing before the deputy registrar, the defendant's counsel raised a preliminary objection regarding the admissibility of the supplementary affidavit filed for the plaintiff. After hearing arguments, the deputy registrar disallowed the supplementary affidavit to be used by reason of O 32 r 13(2) of the Rules of the High Court 1980 ('the RHC'). In the interim, a notice to use affidavits filed for the previous proceedings of the action was served on the solicitors for the defendant. The deputy registrar ruled that to allow the plaintiff to refer to the previous affidavits filed would tantamount to reversing her earlier decision. The plaintiff appealed.

Held, allowing the appeal and granting the orders sought:

(1) The deputy registrar appeared to have refused to allow the reference to the previous affidavits on her own volition even though there was no objection from the defendant. The rejection of the supplementary affidavit purely on technical ground without the defendant showing any prejudicial effect on it was a harsh move. The crucial point should be to do justice and not to be burdened by procedural objection or technicalities. Accordingly, there was an error in refusing to allow reference to the previous affidavits and in rejecting the supplementary affidavit (see p 586A–B).

(2) Due to the circumstances of this case, in particular, the fact that the court docket was missing for a period of time (which was not disputed by the defendant) and the attitude of the defendant and its partners in making several overtures to settle the judgment debt, there was no reason to doubt that the explanation given by the plaintiff for the delay given was sufficient for the purpose of the application for leave to execute on the judgment. Accordingly, the plaintiff's application for leave to execute on the judgment pursuant to O 46 r 3 of the RHC should be allowed. Further, as there was no affidavit in opposition filed nor argument advanced by the partners to contest the validity of the plaintiff's application, leave too should be granted to execute on the judgment against the partners of the defendant pursuant to O 77 r 5(4) of the RHC (see p 586D–G).

(3) The plaintiff did apply to execute on the judgment as early as 1987 and this was followed by a second application in 1993 and a third application in 1999. There was no hearing for a number of years because the court docket was missing. In view of the application being made by the plaintiff before the 12-year

limitation period, there should be no question of applying any of the provisions of the Ordinance since time would have stopped running once the application was filed, and in this case in 1987 as well as in 1993 (see p 587F–H).

(4) In respect of the meaning of the words 'suit' used in the Ordinance, it should be confined to a fresh action and not to a proceeding which was a continuation of an existing action (see p 588A); *Daud v Ibrahim* [1961] MLJ 43 distinguished.

[Bahasa Malaysia summary

Plaintif telah memperolehi penghakiman ingkar terhadap defendan pada 1 Februari 1985. Pada atau lebih kurang 10 Julai 1987, satu permohonan telah dibuat untuk penghakiman itu dilaksanakan terhadap rakan-rakan kongsi defendan. Pembicaraan ditangguhkan oleh kerana dokumen-dokumen tidak disampaikan. Pada 7 Mac 1988, satu perintah untuk menyampaikan dokumen-dokumen tersebut melalui penyampaian ganti telah dibenarkan. Namun demikian, tiada tarikh telah diberikan untuk pembicaraan wajar permohonan tersebut. Ia kemudiannya diketahui bahawa doket mahkamah tidak dapat dikesan. Pelbagai peringatan telah dihantar ke mahkamah untuk satu tarikh pembicaraan tetapi tiada jawapan diberikan oleh mahkamah. Kemudian pada 29 Disember 1993, peguam plaintif diberitahu doket mahkamah dijumpai semula dan nasihat diberikan agar permohonan baru dibuat oleh plaintif. Permohonan kedua kemudiannya difailkan pada tahun 1993 untuk kebenaran melaksanakan terhadap defendan serta terhadap rakan-rakan kongsi defendan. Semasa pembicaraan pada 15 April 1994, satu cadangan untuk menjelaskan hutang dibuat oleh salah seorang rakan kongsi dan pembicaraan sekali lagi ditangguhkan ke 28 Oktober 1994 di mana permohonan dibatalkan dengan kebebasan untuk memfailkan semula atas alasan bahawa pihak-pihak dalam proses merundingkan penyelesaian. Tiada apa yang berhasil daripada cadangan penyelesaian tersebut meskipun pelbagai rundingan telah diadakan. Pada 18 Januari 1999, permohonan untuk kebenaran melaksanakan telah dihantar kepada Pejabat Daftar Mahkamah Tinggi Tawau tetapi ia dikembalikan kepada peguam plaintif sebagai tidak dituntut. Pada 27 Disember 1999, permohonan yang sama difailkan semula dan ini akhirnya telah didengar oleh timbalan pendaftar pada 27 Jun 2000. Timbalan pendaftar menolak permohonan plaintif untuk kebenaran melaksanakan penghakiman terhadap defendan dan rakan-rakan kongsinya. Dalam menolak permohonan plaintif, timbalan pendaftar memutuskan bahawa tiada alasan yang baik telah diberikan atas kelewatan selama 14 tahun dalam melaksanakan penghakiman tersebut dan bahawa rundingan semata-mata bukanlah alasan yang memadai untuk memberikan kebenaran. Satu lagi sebab untuk penolakan tersebut adalah bahawa pada pandangan beliau, perkataan 'suit' seperti yang ditakrifkan

dalam s 2 Ordinan Had Masa Sabah ('Ordinan tersebut') termasuklah prosiding pelaksanaan. Oleh demikian, timbalan pendaftar memutuskan bahawa permohonan plaintif dihalang oleh statut. Di pembicaraan di hadapan timbalan pendaftar, peguam defendan membangkitkan bantahan awal mengenai kebolehterimaan afidavit tambahan yang difailkan untuk plaintif. Setelah mendengar hujah-hujah, timbalan pendaftar menolak penggunaan afidavit tambahan disebabkan A 32 k 13(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Sementara itu, satu notis untuk menggunakan afidavit-afidavit yang difailkan untuk prosiding dahulu tindakan telah disampaikan ke atas peguamcara pihak defendan. Timbalan pendaftar memutuskan bahawa untuk membenarkan plaintif merujuk kepada afidavit-afidavit dahulu sama seperti mengakas keputusan beliau yang lebih awal. Plaintif merayu.

Diputuskan, membenarkan rayuan tersebut dan membenarkan perintah-perintah yang dipohon:

(1) Timbalan pendaftar kelihatan enggan untuk membenarkan rujukan kepada afidavit dahulu atas kesukarelaan sendiri walaupun tiada bantahan daripada defendan. Penolakan afidavit tambahan semata-mata atas alasan teknikal tanpa defendan menunjukkan kesan yang memudaratkan atasnya merupakan satu tindakan yang tegas. Perkara utama adalah pelaksanaan keadilan dan tidak dibebankan dengan bantahan mengenai prosedur atau perkara yang bersifat teknikal. Oleh itu, terdapat kesilapan dalam menolak rujukan kepada afidavit dahulu dan dalam menolak afidavit tambahan (lihat ms 586A–B).

(2) Disebabkan keadaan dalam kes ini, khususnya, hakikat bahawa doket mahkamah hilang untuk satu tempoh masa (yang tidak dipertikaikan oleh defendan) dan sikap defendan dan rakan-rakan kongsinya dalam membuat pelbagai tawaran untuk menjelaskan hutang penghakiman, tiada sebab untuk meragui penjelasan yang diberikan oleh plaintif kerana kelewatan tersebut memadai bagi tujuan permohonan untuk kebenaran melaksanakan atas penghakiman tersebut. Sewajarnya, permohonan plaintif untuk kebenaran melaksanakan penghakiman menurut A 46 k 3 KMT dibenarkan. Seterusnya, oleh kerana tiada afidavit bantahan telah difailkan mahupun hujah dikemukakan oleh rakan-rakan kongsi untuk mencabar kesahihan permohonan plaintif, kebenaran juga sepatutnya diberikan untuk melaksanakan penghakiman terhadap rakan-rakan kongsi defendan menurut A 77 k 5(4) KMT (lihat ms 586D–G).

(3) Plaintif memang telah memohon supaya penghakiman dilaksanakan seawal tahun 1987 dan ini disusuli dengan permohonan kedua pada tahun 1993 dan permohonan ketiga pada tahun 1999. Tiada pembicaraan diadakan untuk beberapa tahun kerana doket mahkamah telah hilang. Memandangkan

A permohonan dibuat oleh plaintif sebelum luputnya had masa selama 12 tahun, tiada persoalan boleh timbul mengenai pemakaian mana-mana peruntukan Ordinan Had Masa Sabah oleh kerana masa seharusnya tamat sebaik sahaja permohonan difailkan, dan dalam kes ini pada tahun 1987 serta tahun 1993 (lihat ms 587F–H).

B (4) Berhubung dengan maksud perkataan 'suit' yang digunakan dalam Ordinan Had Masa Sabah, ia patut terbatas kepada satu tindakan baru dan bukannya kepada satu prosiding yang merupakan sambungan tindakan yang telah wujud (lihat ms 588A); *Daud v Ibrahim* [1961] MLJ 43 dibeza.]

C [*Editorial Note*: The defendants have applied for leave to appeal to the Court of Appeal vide Civil Application No S–08–274 of 2002.]

Notes

D For cases on affidavit in support of application, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 290–298.

For cases on execution of judgment, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 2307.

For cases on limitation of execution of judgment, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2062–2063.

E

Cases referred to

Daud v Ibrahim [1961] MLJ 43 (distd)

Lim Ah Hee, Re; ex parte Perwira Affin Bank Bhd [2000] 3 MLJ 211 (refd)

F *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 (refd)

Megat Najmuddin bin Dato Ser (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)

National Westminster Bank plc v Powney & Ors [1990] 2 All ER 416 (refd)

G *Neo Ong Tew v Neo Ong Hee* 9 *Mallal's Digest* para 2053 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (refd)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)

H *Tractors Malaysia Bhd v Tio Chee Hing* [1993] MLJU 521 (refd)

WT Lamb & Sons v Rider [1948] 2 All ER 402 (refd)

Legislation referred to

I Limitation Act 1953

Rules of the High Court 1980 O 32 r 13(2), O 46 r 3, O 77 r 5(4)

Sabah Limitation Ordinance ss 2, 3

Strait Settlement Ordinance No 56 (Limitation) art 98 A

Peggy Liow Vui Kun (Jayasuriya Kah & Co) for the plaintiffs.
Rizwandean Bukhary M Borhan (Ansari & Co) for the defendants.

Richard Malanjum J: This is an appeal against the decision of the learned deputy registrar dismissing the application of the plaintiffs for leave to execute judgment obtained against the defendants as well as leave to execute against the partners of the defendants. B

In rejecting the application, the learned deputy registrar ruled that there were no good reasons given for the delay in executing the judgment. Further, it was her view that mere negotiation per se should not be a sufficient reason to grant leave. Learned deputy registrar noted the 14 years C delay as being too long by any yardstick. Another reason that she gave for refusing leave was due to item 98 read with ss 2 and 3 of the Sabah Limitation Ordinance ('the Ordinance'). It was her view that the suit as defined in s 2 of the Ordinance should include execution proceeding. As such, the learned deputy registrar ruled that the application of the plaintiffs was statute barred. D

Briefly, the chronological events that led to the application by the plaintiffs vide summons in chambers dated 27 December 1999 ('encl 25') are as follows:

(a) that on 1 February 1985, the plaintiffs obtained a judgment in default against the defendants for the sum of RM104,712.58 plus interest at the rate of 6%pa from the said date to the date of full payment and costs of RM225; E

(b) on or around 10 July 1987, an application was made to execute against the partners of the defendants. Hearing was fixed on 23 September 1987 but was adjourned as the papers were unserved. Further F adjournments were granted for the same reason. On 7 March 1988, an order to serve the papers by substituted service was granted. Unfortunately, no date for the proper hearing of the application was given thereafter. It was then learnt that the court docket could not be traced. Several reminders were sent to the court for a date of hearing but received no response; G

(c) then on 29 December 1993, the solicitors for the plaintiffs was informed of the recovery of the missing docket and an advice was given that a fresh application should be made by the plaintiffs. A second application by way of summons in chambers was then filed for leave to execute against the defendants as well as against the H partners in the defendants. The hearing was fixed on 16 March 1994 with one of the partners, Datuk Gaphur Salleh, having been served. However, the hearing was adjourned to check whether the other partner was served. During the hearing on 15 April 1994, a proposal to settle the debt was made by one of the partners. Hence, the hearing was again adjourned to 28 October 1994 wherein the application was I struck out with liberty to file afresh on the ground that the parties were in the process of negotiating a settlement;

(d) nothing came about on the proposal to settle and thus on 14 March 1996, demand payment was made to the defendants. On 7 August 1996, a letter was sent to Datuk Gaphur resulting in him sending a representative to negotiate for a settlement but nothing came out of it as well;

(e) on 18 January 1999, application for leave to execute was sent to the Tawau High Court Registry, the third application. However, it was returned to the solicitors for the plaintiffs as unclaimed. On 27 December 1999, the same application was refiled and this was heard on 27 June 2000 after a few adjournments. This is therefore, the subject of the present appeal.

There were in fact two parts in the hearing before the learned deputy registrar. Firstly, there was the preliminary objection raised by the learned counsel for the defendants pertaining to the admissibility of the supplementary affidavit filed for the plaintiffs. After hearing the arguments, the learned deputy registrar disallowed the affidavit to be used. In the interim, a notice to use affidavits filed for the previous proceedings of the action was served on the solicitors for the defendants. The second part was the hearing of the argument on the issue of limitation. On 27 September 2000, the learned deputy registrar ruled that to allow the plaintiffs to refer to the previous affidavits filed would tantamount to reversing her earlier decision and that the application of the plaintiffs for leave was caught by the limitation period prescribed under the Ordinance.

Before me, the main thrust of the arguments advanced for the plaintiffs was that the refusal to allow the plaintiffs to refer to the previous affidavits filed on the basis that her earlier decision was erroneous and that the limitation period did not apply to execution proceeding.

For the defendants, their learned counsel focused (and I must say a risky stand) mainly on the issue of limitation period.

At the outset, I bear in mind that this is a rehearing and I should therefore consider the materials before me afresh (see *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97). As such, I will deal first on the issue of the refusal by the learned deputy registrar for the plaintiffs to refer to the affidavits filed in the previous proceedings in respect of this action despite the notice given which was not objected to by the defendants. I should also consider the supplementary affidavit filed (encl 35) which was refused by the learned deputy registrar by reason of O 32 r 13(2) of the Rules of the High Court 1980 ('the RHC'). I bear in mind that there was no affidavit in opposition filed by the defendants thereby attracting the legal principle that in such a case those allegations therein especially the materials ones were accepted as true (see *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 and *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281).

Having read the reasons given by the learned deputy registrar, I must say that I am inclined to agree with the submission of learned counsel for

the plaintiffs that on her own volition, the learned deputy registrar appeared to have refused to allow the reference although there was no objection from the defendants. Further, the rejection of the supplementary affidavit purely on technical grounds without the defendants showing prejudicial effect upon them was in my view a harsh move. The crucial point should be to do justice and not to be burdened by procedural objection or technicalities (see *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385). Accordingly, I am therefore in agreement with the contention of learned counsel for the plaintiffs that there was an error in refusing to allow the reference of the previous affidavits filed and in rejecting the supplementary affidavit filed. If the learned deputy registrar had taken into account those affidavits, she could have ruled otherwise on the issue of whether there were sufficient explanations for the delay in executing the judgment obtained against the defendants. I should therefore allow the plaintiffs to refer to those affidavits including the supplementary affidavit filed in the previous proceeding in connection with this action.

On closer scrutiny of the reasons given in those affidavits and without the defendants filing any affidavit in opposition and in the circumstances of this case, in particular on the fact which was not disputed, that is, that the docket was missing for a period of time and the attitude of the defendants and the partners, especially Datuk Gaphur Salleh, in making several overtures to settle the judgment debt as outlined above, I have no reason to doubt that the explanations given should be sufficient for the purpose of the application for leave to execute on the judgment.

This is not a case of where the plaintiffs went to sleep on their rights. From the affidavits filed, there had been several attempts to execute on the judgment and when one was about to succeed, the defendants or one of the partners therein would send a representative with a proposal to settle. On the part of the plaintiffs, they had been too amenable towards the defendants for reasons best known to them. It is therefore sad to find that having given so much leeway, it behoves upon the defendants to use now all the technicalities of the law to avoid the payment on the judgment obtained by default in the first place.

Accordingly, I should therefore allow the application of the plaintiffs for leave to execute on the judgment pursuant to O 46 r 3 of the RHC in the exercise of my discretion. As there is no dispute on the partners of the defendants, no affidavit in opposition filed nor argument advanced to contest on the validity of the application, it is therefore my judgment that leave should be granted to execute against the partners of the defendants pursuant to O 77 r 5(4) of the RHC.

On the issue of limitation which I noted to be the main plank in the defendants' case, I have considered the probable opposing interpretations given by learned counsel for the respective parties.

For the defendants, it was contended that the word 'suit' in s 3 of the Ordinance should include execution proceeding. It was submitted that since the application for leave was made after the period of 12 years from the date of judgment, it was therefore caught by the Ordinance and thus

A statute barred. The case of *Neo Ong Tew v Neo Ong Hee* (CA) 9 *Mallal's Digest* para 2053 and *Daud v Ibrahim* [1961] MLJ 43 were cited in support of the argument.

Now in *Neo Ong Hee*, an attempt was made to enforce the judgment after a lapse of 20 years. Article 98 of the Strait Settlement Ordinance B No 56 (Limitation) was relied upon. Therein, the word 'suit' was defined as including 'any action or other proceeding'. It was held that the execution proceeding by the judgment creditor was a suit and thus statute barred. In *Daud v Ibrahim*, an application for an order to show cause on the part of the appellant in relation to the transfer of the land was made by the respondent based on an earlier order obtained from the court. However, C it was made after a lapse of 12 years from the date of the judgment. It was held that since the proceeding was not made within the 12 years limitation period, it was therefore statute barred.

For the plaintiffs, an unreported case of *Tractors Malaysia Bhd v Tio Chee Hing* [1993] MLJU 521 was relied upon. There it was held that D the word 'suit' under the Ordinance did not include an execution proceeding. The principle in *WT Lamb & Sons v Rider* [1948] 2 All ER 402 and *National Westminster Bank plc v Powney & Ors* [1990] 2 All ER 416 was followed. Similarly in the case of *Re Lim Ah Hee; ex parte Perwira Affin Bank Bhd* [2000] 3 MLJ 211 it was held that the word 'action' in the Limitation Act 1953 referred to a fresh action and not to an execution E proceeding. The English case of *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 was referred to in support of the preposition held.

From the submissions of learned counsel for the parties, I am in agreement with learned counsel for the plaintiffs that there are two ways of looking at the issue. One is on the interpretation of the word 'suit' as defined F in the Ordinance, and the other is to see whether the application is statute barred in view of the facts and circumstances of this case.

I will deal first, whether the application of the plaintiffs is in fact statute barred. From the facts of this case as given above and taking a simplistic approach, it is plain that the plaintiffs did apply to execute on the judgment G as early as 1987 followed by a second application in 1993 and a third application in 1999. There was no hearing for a number of years as the court docket was missing. I am inclined therefore to agree with the contention of learned counsel for the plaintiffs that in view of the application being made by the plaintiffs before the 12 years limitation period, there should be no question of applying any of the provisions of the Ordinance since time H would have stopped running once the application was filed and in this case in 1987 as well as in 1993.

In respect of the meaning of the words 'suit' and 'action' used in the Ordinance and the Limitation Act 1953 respectively, I agree with the contention of learned counsel for the plaintiffs that the two words should I provide the distinguishing factor between the present case and the case of *Daud v Ibrahim*. In that case, the court was dealing with the word 'action' and not 'suit' as in the Ordinance. Hence, the principle therein would not

be wholly applicable in Sabah. It is also my view that the word 'suit' itself should be self explanatory in that it should be confined to a fresh action and not to a proceeding which is a continuation of an existing action.

For the reasons above, I am therefore not convinced with the argument of learned counsel for the defendants that the application for leave to execute by the plaintiffs is statute barred.

Accordingly, I grant the orders as prayed for by the plaintiffs in encl 25 herein.

Appeal allowed and orders sought granted.

Reported by Lim Lee Na